**PUBLIC PROSECUTOR**

**v.**

**DATO' MAT SAFUAN**

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
AJAIB SINGH SCJ
WAN YAHYA J
[SC CRIMINAL APPEAL NO. 05-134-90]
18 MARCH 1991

***CRIMINAL PROCEDURE:*** *Bail - Non-bailable offence - Power to vary or alter conditions - Jurisdiction - Principles - Intention of legislature - Revisionary powers - Supervisory powers - Object and duty of High Court in exercising discretion - Criminal Procedure Code, ss. 387, 388, 389, 394 - Courts of Judicature Act 1964, s. 35*

***STATUTORY INTERPRETATION:*** *Power to vary or alter conditions of bail - Implied - Any order or refusal - Intent of legislature - Absence of express provision - Discretion of Judge - Criminal Procedure Code, ss. 387, 388, 389, 394 - Courts of Judicature Act 1964, s. 35.*

The respondent M was charged under s. 409 of the Penal Code, a non-bailable offence. The Sessions Court had allowed M's release on the condition that he enter into a bail bond in the sum of RM400,000 in 2 sureties and surrender his international passport. The case was subsequently transferred to the High Court under s. 418A of the Criminal Procedure Code.

M's application for the release of his international passport so that he could make an overseas trip was granted by the High Court. The prosecution appeals, arguing that the implied power to impose conditions for the surrender of M's passport under s. 388 of the CPC is not variable by the High Court either under s. 389 of the CPC or in the exercise of its inherent power; the only means was by way of an appeal under s. 394 of the CPC. Further, the appellants contend that if there is a discretion, it must be confined to the variation on the amount and not the condition of the bail such as the temporary release of the passport.

**Held:**

**[1]** Sections 387 and 388 of the CPC do not have specific provisions for the imposition of conditions. Based on Indian law and the Federal and Supreme Court decisions, where there is a discretion to refuse or grant bail, there is also implied a discretion to grant bail subject to certain conditions and these conditions can be included in a bail bond issued pursuant to s. 388 of the CPC.

**[2]**(a) The power to admit, refuse or cancel bail must necessarily imply the power to vary or alter the same - in view of the order made for the transfer of this case from the Sessions Court to the High Court, the learned Judge was acting well within his jurisdiction to review the condition of bail as if the same was made by him;

(b) section 389 of the CPC is intended to supplement ss. 388 and 389 on the rationale that such condition would provide an adjunctive or supplemental security towards ensuring the attendance of the arrested person at this subsequent trial and justifies the belief that the power given includes a power to revise the exercise of discretion by a police officer and Court of first instance;

(c) a Court may require a certain large amount to be deposited in respect of a non-bailable offence but would be willing to reduce it to a lesser sum on the undertaking of the detained person to surrender his passport.

**[3]** The reason why ss. 388 and 389 do not make any mention of any condition is because the legislature could not have made a provision for the alteration or variation of something which it did not create or was not at that time in existence.

**[4]** Parliament had not intended the words "any order or refusal" in s. 394 of the CPC to refer exclusively to the condition such as the surrendering of passport made under ss. 388 or 389 when no provision for any condition was made or contemplated by the legislature in the first instance.

**[5]** In the absence of any express provision in the CPC to the contrary, a Judge of a High Court may by virtue of s. 4 of the CPC exercise his discretionary power under s. 35 of the Courts of Judicature Act 1964 as the words "In addition to the powers conferred on the High Court by this or any other written law" must refer to other additional supervisory or revisional powers over and above those powers which are already contained in the Courts of Judicature Act itself as well as in any other written law such as the power conferred by the CPC. The appellate remedy under s. 394 of the CPC is neither a simple nor a speedy procedure and is certainly not the best option available in an exigent situation facing an arrested person.

**[6]** If the High Court is to fulfil its supervisory role in providing a speedy and efficacious redress of any injustice arising out of a person's pre-trial detention, then it must be given an unimpeded discretion to intervene and if circumstance so require, to vary any unjust Subordinate Court order in respect of the amount or conditions set out in any bail bond.

*[Appeal dismissed.]*

**Cases referred to:**
*Government of Malaysia & Ors. v. Loh Wai Kong [1979] 2 MLJ 33*
*Hazari Lal Gupta v. Rameshwar Prasad & Anor. [1972] AIR*
*Hidayat Ullah v. The Crown 50 Cr LJ 1949*
*Liaw Kwai Wah & Anor. v. PP [1987] CLJ (Rep) 163*
*PP v. Zulkifflee bin Hassan [1990] 1 CLJ (Rep) 249*
*Re Kota Appalakonda [1942] AIR Mad 740*
*Re Saradamma [1965] AIR Andhra Pradesh 444*
*Varadaraja Mavalliar [1957] 1 Mad LJ (Cri) 717*

**Legislation referred to:**
Courts of Judicature Act 1964, s. 35
Criminal Procedure Code, ss. 4, 387, 388, 389, 394, 418A, Chapter XXXV
Criminal Procedure Code [Ind], ss. 496, 497, 498
Penal Code, s. 409

*For the respondent - Ronald Khoo (Harjeet Singh with him); M/s. Shearn, Delamore & Co.*
*For the appellant - Stanley Isaac, Public Prosecutor*

**JUDGMENT**

**Wan Yahya J:**

On 18 June 1990 the respondent was produced and charged before the Sessions Court Kuala Lumpur in respect of an nonbailable offence punishable under s. 409 of the Penal Code. The learned Sessions Judge allowed the respondent to be released on his entering into a bail

bond in the sum of RM400,000 in two sureties and on condition that he would surrender his international passport to the Court. On the same day the Deputy Public Prosecutor acting under the proviso to s. 418A Criminal Procedure Code applied for and obtained the order for the case to be transferred to the High Court, Kuala Lumpur. On 13 July 1990 the respondent who considered it imperative that he should make a compelling business trip to Jakarta filed a notice of motion in the High Court seeking for an order for the release of his international passport. Shaik Daud, J after hearing both parties varied the condition imposed by the Sessions Judge and ordered that the international passport be returned to the respondent for the purpose of a specific 5 day trip to Jakarta only and that the same be surrendered to the Court within 48 hours of the respondent's arrival in this country.

The Public Prosecutor appealed against the order. It is the appellant's contention that the implied power to impose condition for the surrender of the respondent's passport under s. 388 of the Criminal Procedure Code is not variable by the High Court either under s. 389 of the same Code or in the exercise of its inherent power, but it has to be by way of an appeal under s. 394 of that Code.

It may be helpful at this juncture to ascertain briefly the nature and implication of this frequently exercised practice of our Courts to order an accused person to enjoin to the bail offered by the Court a condition that he surrenders his international passport.

The law relating to bail is set out in Chapter XXXV of the Criminal Procedure Code. Section 387 sets out the right of an accused or arrested person to bail in bailable offence. Section 388 provides for the circumstances where a police officer or the Court may exercise its discretion to release on bail any person accused of a non bailable offence. Both sections do not have any specific provision for the imposition of conditions. However, Indian authorities seem to favour the view that when discretion is given to the Court to refuse or grant bail, that discretion in itself implies a discretion to grant bail subject to certain conditions. But, when there is no discretion to refuse bail, the question of imposing conditions does not arise - *Rex v. Genda Singh & Ors.* [1950] All ER 525. Thus conditions can be included in a bail bond issued pursuant to s. 388 but not to s. 387 as the latter section gives no discretion to the officer or Court to withhold bail when the person arrested is prepared to provide such bail. Similarly in *Hazari Lal Gupta v. Rameshwar Prasad & Anor. AIR* [1972] SC 484 it was held that the High Court while granting bail can lay down a condition restricting the accused person's departure from India by requiring him to surrender his passport. Several earlier Indian authorities had expressed the same view on this matter. In *Varadaraja Mavalliar* [1957] 1 Mad LJ (Cri) 717, the Madras High Court reviewing the case law on this subject held that in non bailable offences the Court can impose restriction in suitable cases. *In re Kota Appalakonda* [AIR 1942 Mad. 740] the Court in holding that condition made under s. 496 of the Indian Cr. P.C. to be invalid made the following observation on the scope of s. 497:

> With regard to non-bailable offences, I can see no objection to imposing conditions of this kind; for the Magistrate has an option to grant bail or to refuse bail and he has also the power under s. 497(5) of the Criminal Procedure Code of causing persons so released to be arrested and committed to custody, which sub-section he would apply in case the condition was not fulfilled.

The provisions of ss. 496, 497 and 498 of the former Indian Criminal Procedure Code correspond with ss. 387, 388 and 389 respectively of our Criminal Procedure Code and for the same reasons as expressed in the aforementioned case, we would agree that analogous fair and reasonable conditions *apropos* to the securing of the accused's subsequent attendance in Court are not illegal and therefore imposable by our Courts. In fact although

no ruling was made in Federal Court's decision in *Government of Malaysia & Ors. v. Loh Wai Kong* [1979] 2 MLJ 33 and the Supreme Court's decision in *PP v. Zulkifflee bin Hassan* [1990] 1 CLJ (Rep) 249 the facts in both cases clearly indicate that the condition for the surrender of passport was not disapproved of by the Court.

Having decided on the legality to impose the condition and in particular the condition requiring the accused to surrender his passport, we next proceed to consider the question whether the Subordinate and the High Court has the power to alter or remove it. Section 388(5) of the Criminal Procedure Code empowers the Court which granted the bail the power to cancel it. The power to admit, refuse or cancel bail must necessarily imply the power to vary or alter the same. In the present case in view of the order made for its transfer from the Sessions Court to the High Court, the learned Judge was acting well within his jurisdiction to review the condition of bail as if the same was made by him.

Section 389 of the Criminal Procedure Code which is relevant to this issue reads:

> The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

This section is intended to supplement the provision on s. 388. The first part of the section contains a directive to the police officer or the Court before which the accused is produced in the first instance, that the amount of bail should be reasonably sufficient to secure the attendance of the person arrested and this amount should not be excessive. The second part confers on the Judge (i) the power to direct in any case, whether there be an appeal or not on conviction, that any person be admitted to bail and (ii) the power to direct that the bail required by a police officer or the Court be reduced or increased. In *Hidayat Ullah v. The Crown* 50 Cr. LJ 1949 the full bench of the Lahore High Court opined that the use of the expression, "The High Court, may in any case, direct that any person be admitted to bail" clearly shows that s. 498 (corresponding to our s. 389) is intended to supplement and complete the provision of s. 497 (our 388) and 498 (our 389) and justifies the belief that the power given includes a power to revise the exercise of discretion by police officer and Court of first instance.

We agree with the above authorities and we would reiterate what was said earlier in *PP v. Zulkifflee bin Hassan* (*supra*) that the High Court has an unfettered judicious discretion in dealing with an application under s. 389.

The appellant now contends that such discretion must be confined to the variation on the amount and not the condition of the bail such as the temporary release of the passport.

As discussed earlier there is no express authority in our Criminal Procedure Code providing for conditions to be included in any bail. The practice to do so however had gained judicial recognition in both Courts in India and Malaysia on the rationale that such condition would provide an adjunctive or supplemental security towards ensuring the attendance of the arrested person at his subsequent trial. No person can be admitted to bail under ss. 388 or 389 purely on his undertaking to abide by some conditions alone without binding himself to forfeit a certain sum in the event of his default, but a person may be released on a bail without any condition attached to it. Such condition therefore, to our mind, is not the principal but only a complementary security to be applied concomitantly with the amount prescribed in the bail bond. Such condition in the bail bond would have a persuasive effect of reducing a larger

amount of bail which would have been otherwise required by the Court. To put it in another way - a Court may require a certain large amount to be deposited in respect of a non bailable offence but would be willing to reduce it to a lesser sum on the undertaking of the detained person to surrender his passport.

The amount of money in the bail bond and not the condition form the prerequisite to the release of an arrested person on bail. Therefore s. 388 makes no mention of any condition, and it follows that such a provision does not appear in s. 389. The reason is obvious - the legislature could not have made a provision for the alteration or variation of something which it did not create or was not at that time in existence.

As against this proposition Mr. Deputy came up with the argument that s. 394 would apply and the respondent should have procured his remedy by way of appeal only.

Section 394 reads

> Any person aggrieved by **any order** or **refusal** of any inferior Court made under this chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior Court.

We are unable to accept that by the expression 'any order or refusal' Parliament had intended these words to refer exclusively to the condition such as the surrendering of passport made under ss. 388 or 389 when no provision for any condition was made or contemplated by the legislature in the first instance.

The intervening power of the High Court in modifying the lower Court's order in this aspect is not entirely without precedents. In *Re Saradamma* AIR 1965 Andhra Pradesh 444 the Court invoked the concurrent jurisdiction of the High Court under s. 497 of the former Indian Criminal Procedure Code (our s. 388) to alter a subordinate Court's order affecting the residential conditions in the bail bond. When considering whether the conditions were fair and reasonable Venkatesam J said:

> The petitioners are citizens of Mysore State and the trial is to take place before the Sessions Judge, Cuddapah. According to the condition imposed, they have to reside in the Cuddapah town, which I am told is more than 200 miles away from their native villages. It is undeniable that it is a matter of great hardship to the accused to comply with that condition. But having regard to the facts of this case referred to above, some condition must be imposed in order to secure the presence of the accused on the due dates of trial, and for an expeditious disposal of the case. In this view, I modify the terms imposed by the learned Sessions Judge as follows:
>
> All the petitioners in both the cases will report to the police at Cuddapah the time of their departure from Cuddapah town, and report themselves to their respective police stations.

In any event, in the absence of any express provision in the Criminal Procedure Code to the contrary a Judge of a High Court may by virtue of s. 4 of the Code exercise his revisionary power under the Courts of Judicature Act 1964, s. 35 of which reads:

> In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate Courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate Court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate Court such directions as to the further conduct of the same as justice may require.

The term

> In addition to the powers conferred on the High Court by this or any other written law

must refer to other additional supervisory or revisional powers over and above those powers which are already contained in the Courts of Judicature Act itself as well as in any other written law such as the power conferred by the Criminal Procedure Code.

The object and duty of the High Court in exercising the discretion has been dealt with by Abdul Hamid, CJ (as he then was) in the Supreme Court Case of *Liaw Kwai Wah & Anor. v. PP* [1987] CLJ (Rep) 163 and in particular at p. 166 where the learned CJ said:

> The principles which should guide the Courts in the exercise of the revisionary powers have been clearly set out by Jenkins CJ in *R v. Lachiram*. In that case his Lordship said that "this controlling power of the Court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly.

Although the purpose of remanding an accused person is never intended to serve as his pre-trial punishment, the outcome of such detention can often be misconstrued as an oppressive privation of his personal liberty especially so when at the end of a prolonged detention and trial the person detained is found to be not guilty. The Court have always leaned in favour of admitting an accused person to bail. Various conditions and circumstances are considered in granting bail and these must necessarily vary from time to time. Subsequent deterioration in the health of a remanded person, the prospects of a serious illness or bereavement of a close relative, an unduly delayed trial, or consequent evidence lending to establish accused's innocence are some of the changing circumstances which may affect a persons discretionary right to bail. For that reason several ingresses to bail has been provided by statute which gives the option to an accused person to either go before the same Court or apply to higher Court for reconsideration or variation of his bail. It is for him to proceed by whichever avenue that may appear to be more expeditious or practical in the circumstances. Moreover the appellate remedy under s. 394 Criminal Procedure Code, as suggested by Mr. Deputy is neither a simple nor a speedy procedure and is certainly not the best option available in an exigent situation facing an arrested person.

If the High Court is to fulfil its supervisory role in providing a speedy and efficacious redress of any injustice arising out of a person's pre-trial detention, then it must be given an unimpeded discretion to intervene and if circumstance so require to vary any unjust Subordinate Court order in respect of the amount or conditions set out in any bail bond.

In view of the above findings, we do not consider it necessary to deal with the principle governing the alternative application of inherent power alluded to in the learned Judge's written decision.

We accordingly dismiss the appeal.

Also found at [1991] 2 CLJ 1112